Supreme Court, U. S.
FILED
MAR 15 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 75-1326

LEWIS O. VICE,
Appellant,

vs.

J. A. FERGUSON AND THOMAS W. SANFORD,
SUBSTITUTE TRUSTEE,
Appellees.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The judgment of the Supreme Court of Mississippi is set forth in the appendix, infra, pages A1-A4, and is reported at 322 So. 2d 760 (1975).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(2), this being an appeal which draws into question the Replevin statutes of Mississippi, Mississippi Code 1942 Amended Section 2841, through 2869; which this Court declared a similar set of laws to be invalid in the case of *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972). The control and application of said statutes, as to the facts of this case, by the state Courts of Mississippi, is repugnant to the Due Process Clause and the Equal Protection Clause of the Constitution of the United States.

I.

CAN THE MISSISSIPPI COURTS ABSOLUTELY IGNORE THE UNCONSTITUTIONALITY OF THE MISSISSIPPI REPLEVIN LAWS IN FULL FORCE AND EFFECT ON FEBRUARY 7, 1969, *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972); *North Georgia Finishing, Inc.* v. *Di-Chem., Inc.*, 419 U.S. 601, 42 L. Ed. 2d 751, 95 S. Ct. 719 (1975); AND DENY THIS APPELLANT HIS CONSTITUTIONAL RIGHTS UNDER THE BILL OF RIGHTS AND THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?

NO. The Mississippi Courts went with all of the Mississippi statutory law on Mississippi Replevin laws in full force and effect, on February 7, 1969, which this Court has declared a similar set of laws to be unconstitutional on the following grounds, to-wit:

1. A state's judgment replevin statutes which authorize summary seizure of goods or chattels by state agents upon the ex parte application for a writ by a private person who merely files a complaint for repossession, alleging in conclusory fashion that he is "lawfully entitled" to the possession of the property, and who files a security bond for double the value of the property, violates the Fourteenth Amendment's guaranty that no state shall deprive any person of property without due process of law, insofar as the statutes deny the defendant's right to a prior opportunity to be heard before chattels are taken from him notwithstanding that the defendant will eventually have an opportunity for a hearing at the trial of the repossession action which the Plaintiff is required to pursue, and notwithstanding that the defendant has

3 days after seizure of the property to reclaim possession by posting his own security bond.

2. A state's prejudgment replevin laws which authorize summary seizure of goods or chattels by state agents upon an ex parte application of a private person who merely posts a bond for double the value of the property, and who files an affidavit of the value of the property, violate the Fourteenth Amendment's guaranty that no state shall deprive any person of property without due process of law, insofar as the state's laws deny the possessor the right to a prior opportunity to be heard before the chattels are taken from him, notwithstanding that the possessor may regain possession by filing a counterbond within 3 days after the seizure, and notwithstanding that he may obtain a postseizure hearing by initiating a lawsuit.

3. The Fourteenth Amendment's protection of "property" does not safeguard only the rights of undisputed ownership, but also extends interest, including statutory entitlements.

4. The due process right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions; the purpose of such requirement is not only to ensure abstract fair play to the individual, but more particularly is to protect his use and possession of property from arbitrary encroachment, minimizing substantively unfair or mistaken deprivations of property.

Appellant, Vice, on March 25, 1968, purchased a certain 1965 Ford automobile, described herein as the subject matter of this litigation, and financed the purchase of said automobile with the Deposit Guaranty National

Bank with the execution of a note and Deed of Trust (R-124).[1]

On February 7, 1969, Appellee, Ferguson, a third party, without an interest in said automobile, without an interest in said note and deed of trust (R-124), executed by Appellant, Vice, executed an affidavit in Replevin (R-181), and the Justice of the Peace and Deputy Sheriff, acting under "color of law" entered upon private property of Appellant, seized said automobile and personal property of Appellant contained therein, without notice (R-184).

Subsequent to the seizure of Appellant's automobile and personal property contained therein, Justice of the Peace released said automobile to Appellee, Ferguson, without a bond as required by law, on February 7, 1969.

Appellee, Ferguson, converted said automobile to his own complete control, possession, benefit and use, then "Non-Suited" his Replevin action (R-63, 188).

Appellee's "Declaration in Replevin" (R-62), states:

> "one 1965 Ford automobile, serial #505ZC109366 was seized and is now in the possession of the Sheriff of Hinds County, Mississippi."

Upon learning of Appellee's dismissal of this Replevin action, Appellant, Vice, proceeded to the Sheriff's office to regain possession of his property. When he arrived, the Sheriff's office informed Appellant, Vice, that:

> "We do not have anything pertaining to the case #50-932 in our office as of August 14, 1969. *We have never had possession of this car.* (1965 Ford)" (R-64) (Emphasis added).

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1. The "R" reference numbers shown herein are to the page numbers of the record in this case filed in the Supreme Court of the State of Mississippi.

Subsequent to Appellee's dismissal of his Replevin action and conversion of Appellant's property said Appellee on November 25, 1969, filed a Bill of Complaint for Foreclosure (R-18), wherein said Appellee seeks the following relief (R-21):

(a) Money due Complainant from Defendant.

(b) Reasonable attorney fees as provided in said note.

(c) Order to sell car and apply proceeds to debt.

(d) Accrued costs.

II.

WAS THE WRONGFUL REPLEVIN, *McPherson* v. *Acme Lumber Co.*, 70 Miss. 649, 12 So. 857 (1893); *Robinson* v. *Friendly Finance Co.*, 241 Miss. 239, 139 So. 2d 256; *Fuentes* v. *Shevin*, 467 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 1972); *North Georgia Finishing, Inc.* v. *Di-Chem., Inc.*, 419 U.S. 601, 42 L. Ed. 2d 751, 95 S. Ct. 719 (1975); APPELLEE'S FAILURE TO SELL SAID FORD AUTOMOBILE, AND CONVERSION OF SAID PROPERTY TO APPELLEE'S PERSONAL POSSESSION, USE, BENEFIT AND PROFIT, CONSTITUTE A BAR TO FORECLOSURE?

The Appellee, Ferguson, has converted the personal property to his personal use and enjoyment and has also foreclosed for the entire remaining debt and legal fees; therefore does this:

> Violate the Appellant's due process rights under the 14th Amendment for a Court to sanction the act of a creditor in wrongful replevining some goods *without resale and also suing to foreclose* on the debt for which the goods were pledged as collateral?
>
> Yes, Appellant contends that it does.

A repossessing party (Appellee had no interest at time of Replevin) under a deed of trust must handle the goods in such a manner as to protect the *debtor's interest* in the goods. *Martin* v. *Coker*, 204 Miss. 576, 37 So. 2d 772 (1948). The correct way to protect the debtor's interest is to sell the goods in a proper manner and apply the proceeds to the debtor's account. *General Motors Acceptance Corp.* v. *Dickinson*, 249 Ky. 442, 60 S.W. 2d 967 (1935). The Mississippi case of *Bankston* v. *Hill*, 134 Miss. 288, 98 So. 689 (1924), is in accord with the above mentioned Kentucky case.

The trial record will clearly show that the *property was never sold, no accounting made.* Yet, the Mississippi Supreme Court went against all other case law and statutory law to affirm the acts of the Appellees.

The UCC (§ 79-9-505) required (in circumstances such as the present situation) a repossessing seller to resell the goods within a certain time or forego all claims to foreclosure on the note for any deficiency. Under *Pre UCC law* (this cause being filed prior to the adoption of the UCC by Mississippi) failure to handle properly the repossessed goods resulted in a conversion by the seller and extinguished the debt. C.J.S. Chattel Mortgages § 342 (c). The holding in *Voges* v. *Ward*, 98 Fla. 304, 123 So. 785 (1929) supports the conversion rule.

Appellant was further deprived of his Constitutional right to his property and denied due process of law guaranteed to him by the Constitution of the State of Mississippi and the Fifth (5th) and Fourteenth (14th) Amendments of the United States Constitution.

III.

WAS THE WRONGFUL FORECLOSURE ACTION, *Martin* v. *Coker*, 204 Miss. 576, 37 So. 2d 772 (1948); *Voges* v. *Ward*, 98 Fla. 304, 123 So. 785 (1929); *Cox Motor Co.* v. *Castle*, 402 S.W. 2d 429 (Ky. 1966), A VIOLATION OF THE APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE BILL OF RIGHTS AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

Yes. The correct way to *protect the debtor's interest is to sell the goods* in a proper manner and apply the proceeds to the debtor's account. *Martin* v. *Coker*, 204 Miss. 576, 37 So. 2d 772 (1948); *General Motors Acceptance Corp.* v. *Dickinson*, 249 Ky. 422, 60 S.W. 2d 967 (1935); *Bankston* v. *Hall*, 134 Miss. 288, 98 So. 689 (1924); *Voges* v. *Ward*, 98 Fla. 304, 123 So. 785 (1929); *McPherson* v. *Acme Lumber Co.*, 70 Miss. 649, 12 So. 857 (1893).

1. The Appellant was denied a fair trial.

(a) The trial court refused the Appellant the right to be heard on his demur and preliminary pleadings, as required by law (R-195).

(b) The trial court refused to dismiss Appellee's case on motion of Appellant for default judgment because of Appellees' refusal to answer interrogatories, as required by law (R-111).

(c) The trial court entered an order in this case on the 19th day of June, 1970 (R-97), which provides, "the above styled and numbered cause is herewith moved from the equity side of the court to the law side." However, the trial court violated its own order[2]

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2. The United States Supreme Court in *U. S.* v. *Milliken Imprinting Co.*, 26 S. Ct. 572, 573, 202 U.S. 168, 50 L. Ed. 980, held that:

"Reformation is not an incident to an action at law, but can be granted only in equity."

(R-97); in allowing Appellees to reform Appellant's deed of trust (R-124), to cover Appellee's Ferguson, note dated January 24, 1967 (R-141), in place of Appellant's Vice's note dated March 25, 1968, and referred to in deed of trust (R-124), for the reason that said Appellee would not produce Appellant's note dated March 25, 1968 (see testimony on note R-125) (R-22).

(d) The trial court denied the Appellant due process of law provided under the provisions of *Miss. Code of 1942 Ann., Section 115. Instrument must be exhibited*, which states:

> "The instrument must be exhibited to the person from whom the payment is demanded, and when it is paid must be delivered to the party paying it."

For the reason that said note, executed by the Appellant on March 25, 1968, and referred to in Appellant's Deed of Trust (R-124), was never produced to the Court or presented to Appellant with demand for payment, as required by law.

(e) The trial court denied the Appellant due process of law provided under the provisions of *Miss. Code Ann., Section 59. Liability of Person Signing*, which states:

> "No person is liable on the instrument whose signature does not appear on the Appellee's note dated January 24, 1967 (R-144), and upon which Appellee's foreclosure action is founded."

(f) The trial court denied the Appellant due process of law as provided under the provisions of *Miss. Code Ann., Section 1546. Judgment remedial orders*, states in part:

> ". . . the judge thereof *SHALL* make an order for the *PROTECTION OF THE PROPERTY* in controversy." (Emphasis added).

For the reason that the trial court denied Appellant's "Motion requesting court for order requiring property involved in case at Bar and now in the illegal and unlawful possession of Complainant, J. A. Ferguson, be surrendered to the possession of the Hinds County Sheriff's Department for safekeeping." (R-34). Order (R-37).

(g) The trial court with its control and application of Mississippi State Law denied the Appellant due process of law as provided under the provisions of *Miss. Code Ann., Section 1546. Judgment-remedial orders*, set in part and referred to herein above, for the reason that the trial court denied Appellant's "Motion for Order for Protection of Personal Property," (R-71). Order (R-99).

(h) The trial court with its control and application of the Mississippi State Law, denied this Appellant due process of law in refusing to permit Appellant to introduce Exhibits, Evidence, Records as to prior action between parties, i. e., replevin action, Hinds County No. 50-932, and that said Exhibits, Evidence and Records was necessary for Appellant to show that Appellee had converted the property to his own personal possession for his personal use, pleasure, benefit, and profit instead of selling said property and applying proceeds to the alleged foreclosure action against this Appellant. Note Court's comment on evidence, exercising control of case, and suppressing evidence with direct bearing on Appellant's rights under the due process clause of the United States Constitution (R-188-189) (R-162-163).

(i) That the trial court with its control and application of the Mississippi State Law denied this Appellant due process of law in refusing to admit Appellant's exhibit consisting of a Deed of Trust on 1965 Chevrolet, Note testimony and court's comment (R-155, 156), said Deed of Trust being executed by Appellee on January 24, 1967, as set out and reflected on the face of Appellee's Promissory Note (R-141).

2. That the trial court with its control and application of the Mississippi State Law denied this Appellant equal protection under the law and due process of law in rendering a series of void judgments (R-193, 202, 203).

(a) The judgment (R-193), further orders the sale of Appellant's 1965 Ford automobile. The judgment retains jurisdiction for the county court for such further orders as may be necessary and reads as follows:

> "And the court retains jurisdiction of this cause for such further orders as may be necessary, including the determination of a reasonable attorney's fee."

The judgment (R-193), entered on September 30, 1970, is null and void and must be reversed for the following reasons:

1. The judgment is not a law court judgment.

2. The judgment does not adjudicate appellant, Vice's rights to his note and chattel deed of trust dated March 25, 1968.

3. The judgment does not designate the owners of said note.

4. The law court order must be complete in itself and the action concluded by a single judgment.

5. A money judgment must show the denomination of money expressed in said judgment.

6. The judgment awards appellees a deficiency judgment and the deficiency judgment was not demanded or prayed for in the action filed. The said automobile *HAS NOT BEEN SOLD.*

7. The judgment does not adjudicate the interest of Thomas W. Sanford in Appellant's note and chattel deed of trust, dated March 25, 1968.

8. The judgment entered here (R-193), on September 30, 1970, was for a greater amount than sought by the Appellees.

(b) On December 8, 1970, the lower court entered an order in this case (R-202), wherein the order reads in part:

> "It is by this court ordered and adjudged that the Defendant's motion to set aside the judgment of this court and to grant Defendant a new trial is hereby overruled *and the judgment of this court is hereby final and complete.*"

(c) On December 10, 1970, two days after the court entered the order (R-202), that its judgment entered on September 30, 1970 (R-193), was "*final and complete*", the court entered another judgment in this case (R-203), wherein the appellees are awarded "$500.00 for payment of attorney fees expended in this cause and that said judgment bear interest at the rate of 6% per annum until paid and that the defendant be assessed with all costs accrued or to accrue in the collection of said judgment for all of which let execution issue."

This judgment (R-203), was entered in this cause of action two (2) days after the court entered an order (R-202), the case was closed and that the judgment of September 30, 1970 was final and complete, without reopening the case.

Attorney fees can not be allowed unless proven to be reasonable and the terms of the note provide for attorney fees. Appellees never did produce Appellant's note dated March 25, 1968, at the trial.

(d) On January 9, 1973, the record hereat (R-233), shows a judgment entered into this case, entitled,

FINAL JUDGMENT ON APPEAL

which reads in part:

> "And having examined the record is of the opinion that the *judgments* entered in this cause are correct and in accordance with the law and should be and are *hereby* affirmed."

Then said judgment (R-233), continues and proceeds *TO CHANGE THE JUDGMENTS* (R-193, 202, 203), entered in this cause and reads as follows:

> "IT IS, THEREFORE, ORDERED AND ADJUDGED THAT THE JUDGMENT ENTERED in this cause on or about the 30th day of September, 1970, in the amount of $414.37, less a credit of $200.00, be and the same is hereby affirmed, and the judgment entered in this cause on or about December 10, 1970, for attorney fees in the amount of $500.00 be and the same is hereby affirmed and the Appellee is allowed damages of five per cent (5%) as permitted by law in the amount of $35.87, and interest at the rate of six per cent (6%) in

> the amount of $91.44, for a total judgment of $841.68, together with interest thereon at the rate of 6% per annum until paid, and Appellant is hereby assessed with all costs of court and the cost of this appeal, for all of which execution may issue."

The judgment here (R-233), can not be allowed to stand. The findings of the Circuit Court here on appeal was that the lower court's judgment would be affirmed.

Then in its judgment, proceeds to revise the judgments (R-193, 202, 203), entered in this case by the County Court.

The judgment of the lower court, though, affirmed is changed to show the total amount of the judgment from $914.37 plus interest and cost to $841.68, including interest and cost.

The Circuit Court can not alter or render a judgment on the issues without a trial of the case on its merits.

DEMURRER, ANSWER AND AFFIRMATIVE DEFENSES FILED UNDER OATH

Appellant, Vice, filed in the lower court his "Demurrer, Answer and Affirmative Defenses" under oath (R-49), Appellant, Vice, submits that the denials set out therein put into controversy the issues involved in this cause of action and the Appellees have totally *failed to offer proof* in support of their allegations set out in Appellee's amended Bill of Complaint (R-18). It has been the law in Mississippi, and still is, that if the answer denies a fact under oath, and *no proof* is offered in support of the fact by the Complainant the answer must be taken as true and judgment rendered in favor of Appellant.

In *Fulton* v. *Woodman*, 54 Miss. 158, the Supreme Court of the State of Mississippi, held that:

> "If the answer denies a fact under oath, and no proof is offered in support of the fact by the Complainant, the answer must be taken as true."

The judgments entered in this cause are defective and deny this Appellant equal protection under the law and due process of law.

(e) That the trial court judgment (R-193), is null and void for the reason that Appellant's debt, to said bank, represented by a promissory note referred to and described in Appellant's Deed of Trust (R-124), was never produced by the Appellee to show that the note has been assigned to him, and instead chose to attempt to show an interest in said property by a series of void assignments all of which denied this Appellant equal protection of the law and due process of the law.

1) First assignment (R-141-A), to Appellee, Ferguson, from the bank, of his note dated January 24, 1967 (R-147).

On February 10, 1969, Appellee, Ferguson, paid $378.40 to the Deposit Guaranty National Bank (Ferguson check shown at (R-143)), alleged to be the amount due on Appellee, Ferguson's note to the bank (R-141), with this payment the note (R-141), was paid in full and discharged.

This assignment (R-141-A), is null and void for the reason that the Appellee, Ferguson, note (R-141), is null and void, having been paid in full, reacquired by the maker and discharged before the assignment.

2) The second instrument (R-145-A), purports to be an assignment by the bank of all of its rights and interests, to Appellee, Ferguson, on Appellant, Vice's chattel Deed of Trust. (R-124).

This purported assignment (R-145-A), is null and void by law for the reason that it is separate and apart from the instrument that it purports to assign. Section 72, Mississippi Code 1942, Ann., reads as follows:

> Section 72.
>
> "The endorsement must be written on the instrument itself or upon a paper attached thereto."

The promissory note executed by Appellant, Vice, on March 25, 1968, and referred to in Appellant, Vice's chattel Deed of Trust (R-124), and is being assigned here (R-145-A), is the debt secured by said chattel Deed of Trust (R-124).

By law this chattel Deed of Trust can not be transferred without the note and debt that said chattel Deed of Trust secures.

The law established by the Courts in:

Carpenter v. *Longan*, 16 Wall. (U.S.) 271, 21 L. Ed. 313, held that

> "A transfer of a mortgage without a debt secured by it is a nullity."

Farmers' Bank v. *Douglass*, 11 Smedes & M. (Miss.) 469, held that

> "The mortgage without the note or debt, is not a negotiable instrument."

Therefore, by law this assignment is null and void.

3) The third assignment (R-148), dated November 24, 1969, is the second time the Deposit Guaranty National Bank attempts to assign Appellee, Ferguson, his own promissory note to the bank dated January 24, 1967 (R-141), after said note (R-141), was paid in full and discharged on February 10, 1969, by Appellee, Ferguson (R-141-A), the maker.

This purported assignment (R-148), by law is null and void for the reason that the debt (R-141), has been paid and discharged and is null and void.

The attempted transfer of Appellee, Ferguson, Deed of Trust, dated January 24, 1967 (R-25), is null and void by law for the reason that if the debt is cancelled (R-141), then the mortgage is cancelled (R-25).

The attempted assignment (R-148), is null and void by law for the reason that it is separate and apart from the instruments (R-141, R-25), which it purports to assign and under Section 72, Mississippi Code, 1942, as amended, required, that,

> "The endorsement must be written on the instrument itself or upon a paper attached thereto."

Appellant, Vice, under the law can not have any liability on the note (R-141), and chattel Deed of Trust (R-25), which this assignment (R-148), purports to assign *for the reason that Appellant, Vice's signature does not appear any place on these instruments as required by Section 59 Mississippi Code 1942, as amended, which reads*:

> Section 59. Liability of person signing—
> "No person is liable on the instrument whose signature does not appear thereon."

Therefore, *by law* this assignment (R-148), is null and void.

4) The fourth instrument (R-150), dated November 24, 1969, purports to be a substitution of trustee on Appellee, Ferguson's chattel deed of trust dated January 24, 1967 (R-25).

Only the beneficiary on a chattel deed of trust has the power to substitute a trustee.

The attempted assignment (R-148), of Appellee, Ferguson's chattel deed of trust (R-25), is by law null and void for the reasons set out herein above.

Therefore, if the assignment is void then it stands that Appellee, Ferguson, can not be beneficiary on his own chattel deed of trust dated January 24, 1967 (R-25), therefore, Appellee, Ferguson, by law can not make this substitution of trustee (R-150).

This instrument, substitution of Trustee (R-150), is by law null and void.

5) The fifth instrument on which Appellees base their foreclosure action is a substitution of trustee (R-152), dated February 20, 1970, purports to substitute Thomas W. Sanford as trustee on Appellant, Vice's chattel Deed of Trust (R-124), dated March 25, 1968.

This instrument, substitution of trustee (R-152), is by law null and void for the same reasons as set out under ⁋5 above. The assignment (R-145-A), attempted on Appellant, Vice's chattel Deed of Trust (R-124), failed for the reasons set out under ⁋3 herein above.

Therefore, by law this substitution of trustee (R-152), is null and void for the reason that if the assignment (R-145-A), is null and void then Appellee, Ferguson, is not beneficiary on Appellant, Vice's chattel Deed of Trust (R-124).

6) The sixth instrument on which Appellees claim an interest in Appellant's property and on which Appellees base their foreclosure action is an assumption agreement (R-122), dated March 25, 1968, wherein J. D. King, Vice-President of Deposit Guaranty National Bank grants Appellee, Ferguson, permission to sell a 1965 Ford to Appellant, Vice, and Appellant, Vice agrees to buy said 1965 Ford in accordance with the terms and conditions of one certain promissory note and chattel Deed of Trust dated March 25, 1968 (R-124), executed by Appellant, Vice, on March 25, 1968, and referred to in the assumption agreement (R-122).

The execution of Appellant, Vice's chattel Deed of Trust (R-124), and the promissory note referred to therein on March 25, 1968, to the Deposit Guaranty National Bank, said chattel Deed of Trust and promissory note was given in consideration for the cancellation of lien and release of Appellee, Ferguson's promissory note and chattel Deed of Trust dated January 24, 1967 (R-141, 25).

If the liability of the Appellee, Ferguson, continues on the promissory note and Deed of Trust dated January 24, 1967 (R-141, 25), then the Bank has not paid any consideration for Appellant, Vice's promissory note and chattel Deed of Trust (R-124), executed to the Bank on March 25, 1968, and no valid substitution takes place.

In the case of *North American Life Ins. Co.* v. *Smith*, 178 Miss. 238, 172 So. 135 the court held, that:

> "Where conflict between an exhibit and allegations of bill arises, the former controls."

Therefore, if the liability of Appellee, Ferguson, on his note and Deed of Trust (R-141, 25), was discharged on March 25, 1968, by the bank as a consideration for the new contract (R-124), executed by Appellant, Vice, Appellees are without any legal right whatsoever in Appellant's property and can not by law maintain their cause of action.

The legal right in Plaintiff to this matter in dispute is the necessary foundation of every action at law:

Wilson v. *McElroy*, 2 Smedes & M. 241;

Eckford v. *Hogan*, 44 Miss. 398;

Dowell v. *Brown*, 12 Smedes & M. 43.

The Mississippi Supreme Court went against all of the Mississippi statutory law and case law of the State in its consideration, determination, and disposition of said cause in its judgment to affirm the void judgment of the Circuit Court. Lower Court judgments set forth in the appendix, infra pp. A5-A10.

In the event the Court does not consider appeal the proper mode of review, Appellant requests the papers whereupon this appeal is taken be regarded and acted upon as a Petition For Writ of Certiorari pursuant to 28 U.S.C. 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Equal Protection Clause and the Due Process Clause of the United States Constitution, U. S. Const., Amend. 5; Amend. 14, Sec. 1.

The Appellant questions the validity of the Mississippi Replevin Law, in full force and effect, on February 7, 1969, Miss. Code 1942 Ann., Sec. 2841; Miss. Code 1942 Ann., Sec. 2845; Miss. Code 1942 Ann., Sec. 2851; Miss. Code 1942 Ann., Sec. 2859, which states, in relevant part:

§2841. How replevin commenced.

If any person, his agent or attorney, shall make an affidavit, setting forth:

(a) A description of any personal property;

(b) The value thereof, giving the value of each separate article;

(c) That he is entitled to the immediate possession thereof;

(d) That the same is in the possession of the defendant; and

(e) That the defendant wrongfully took and detains, or wrongfully detains the same;

And shall present the affidavit to a judge of the Supreme Court, a judge of the circuit court, or a chancellor, or to a clerk of a circuit or chancery court, or to the deputy of such clerk, or to any justice of the peace, or to the mayor of any city, town, or village, it shall be the duty of the officer to issue a writ of replevin for such personal property, returnable, as a summons, before the proper circuit court when the value exceeds two hundred dollars, or to the court of the proper justice of the peace if the value shall not exceed that sum; and the affidavit shall be returned to and filed in the proper court at once. And the above mentioned officers of one county may issue a writ of replevin returnable to the proper court of another county where the property may be found.

§2845. Form of the writ.

The writ of replevin may be to the following effect, viz.:

"The State of Mississippi.

"To any lawful officer of ..... county:

"We command you to take (here describe the property as in the affidavit), alleged by ..... the Plaintiff, to be wrongfully detained by ....., defendant, and to deal therewith according to law; and to summon the said defendant to appear before ...., a justice of the peace of said county, in district No. ....., at ..... at ..... o'clock .... M., on ..... the day of ....., A.D. ....., to answer ....., the plaintiff, for the unlawful detention of said property.

"Witness my hand, the ..... day of ....., A.D. .....

"..... J.P."

§2851 Plaintiff may give bond and receive property-bond to cover damage to or depreciation in value of property covered.

If the defendant shall not give bond within two days from the seizure of the property, the sheriff or other officer shall deliver the same to the plaintiff, upon the plaintiff entering into bond to the defendant, with sufficient sureties, in double the value of the property, to be ascertained by the valuation of the officer, conditioned that he will prosecute the writ to effect, and without delay make return of the property to the defendant if return thereof be adjudged, and pay the defendant such damages as he may sustain by the wrongful suing out of the writ, and also costs as may be awarded against him; and in the event the judgment of the court shall be that the plaintiff restore the possession of the property to the defendant and the plaintiff shall deliver up said property in obedience to the judgment of the court, the plaintiff and the sureties on his replevin bond, regardless of what statute the bond is executed under, shall be liable to the defendant for any damages to, or depreciation in the value of, such property from the date of the surrender of said property to the plaintiff and the execution of his replevin bond to the date of its surrender by the plaintiff in obedience to the judgment of the court, in addition to any other damage which the defendant may sustain by reason of the delivery of said property to the plaintiff, or his retention thereof; in virtue of said bond, and the defendant may recover such damages in the replevin suit, or may institute a separate action therefor on the plaintiff's replevin bond; but, if neither party give bond, the property shall remain in the hands of the officer, subject to the right of either party before the trial to give bond and receive the property.

§2859. The pleadings.

The declaration may be filed after the issuance of the writ, if it be filed on or before the day of the return term, or before any order of dismissal be taken; and the action may be tried at the first term of the court. The defendant may plead as provided by law.

SOURCES: Laws, 1960 ch. 269.

The validity of the following Mississippi Code Sections are not being questioned, however, this Appellant was denied his rights, equal protection and due process of law as provided under the provisions of the following Mississippi Code sections:

Miss. Code 1942 Ann., Sec. 59. Liability of Person signing.

Miss. Code 1942 Ann., Sec. 72. Indorsement—how made.

Miss. Code 1942 Ann., Sec. 112. Presentment.

Miss. Code 1942 Ann., Sec. 115. Instrument must be exhibited.

Miss. Code 1942 Ann., Sec. 1546. Judgment - - - remedial orders.

Miss. Code 1942 Ann., Sec. 1616. Appeals from County Court.

QUESTIONS PRESENTED

The control and application of said statutes, as to the facts of this case by the state Court of Mississippi, is repugnant to the due process clause and the Equal Protection Clause of the Constitution of the United States.

I.

CAN THE MISSISSIPPI COURTS ABSOLUTELY IGNORE THE UNCONSTITUTIONALITY OF THE MISSISSIPPI REPLEVIN LAWS IN FULL FORCE AND EFFECT ON FEBRUARY 7, 1969, *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972); *North Georgia Finishing, Inc.* v. *Di-Chem., Inc.*, 419 U.S. 601, 42 L. Ed. 2d 751, 95 S. Ct. 719 (1975); AND DENY THIS APPELLANT HIS CONSTITUTIONAL RIGHTS UNDER THE BILL OF RIGHTS AND THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?

II.

WAS THE WRONGFUL REPLEVIN, *McPherson* v. *Acme Lumber Co.*, 70 Mississippi 649, 12 So. 857 (1893); *Robinson* v. *Friendly Finance Co.*, 241 Mississippi 239, 139 So. 2d 256; *Fuentes* v. *Shevin*, 467 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972); *North Georgia Finishing, Inc.* v. *Di-Chem., Inc.*, 419 U.S. 601, 42 L. Ed. 2d 751, 95 S. Ct. 719 (1975); APPELLEE'S FAILURE TO SELL SAID FORD AUTOMOBILE, AND CONVERSION OF SAID PROPERTY TO APPELLEE'S PERSONAL POSSESSION, USE, BENEFIT, AND PROFIT, CONSTITUTE A BAR TO FORECLOSURE?

III.

WAS THE WRONGFUL FORECLOSURE ACTION, *Martin* v. *Coker*, 204 Miss. 576, 37 So. 2d 772 (1948); *Voges* v. *Ward*, 98 Fla. 304, 123 So. 785 (1929); *Cox Motor Co.* v. *Castle*, 402 S.W. 2d 429 (Ky. 1966), A VIOLATION OF THE APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE BILL OF RIGHTS AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

STATEMENT

On March 25, 1968, Appellant bought a 1965 Ford automobile and financed said automobile with the Deposit Guaranty National Bank with the execution of a Promissory Note and a Chattel Deed of Trust.

On February 7, 1969, a third party, Appellee, Ferguson, without notice, without demand, and without any legal interest in said Ford automobile, executed an "Affidavit in Replevin", seized said automobile containing $5,000.00 worth of Appellant's personal property consisting of a valuable coin collection, tools, tape player, tapes, fishing and camping gear and without posting a bond removed said property from the private premises of this Appellant to the home of said Appellee, Ferguson, 3003 Longwood Drive, Jackson, Mississippi.

Said Appellee, Ferguson, *filed a false "Declaration in Replevin."* Subsequent to the filing of said Declaration, Appellee, Ferguson, filed a "Non-Suit", and the court without jurisdiction and without a hearing dismissed Appellee's replevin action leaving Appellant's property in the possession and complete control of Appellee, Ferguson. After learning of the "Non-Suit" Appellant proceeded to the Sheriff's office to recover his property, on the basis of the Declaration in Replevin, where said Appellant was informed that the Sheriff's office had no record of Appellant's property.

On November 25, 1969, ten (10) months after Appellee, Ferguson's conversion of Appellant's property to his, Ferguson's possession, control, use, benefit, pleasure and profit, said Appellee, Ferguson, filed his foreclosure action, the case at bar, against said Appellant.

Appellees base their foreclosure action on the purported assignment of a Promissory Note dated January 24, 1967, on which Appellee, Ferguson, is the maker.

On June 19, 1970, the trial court, in open court, entered an order to move "—the above styled and numbered cause is herewith moved from the equity side of the court to the law side."

A trial was had and the county court entered a judgment in said case on September 30, 1970, wherein the trial court ordered, "that the Sheriff of Hinds County, Mississippi, immediately cause to be made a public sale of the above described automobile as required by law and promptly have his report of the sale before this Court. . .". *The property has not been sold.* The report of the sale *has not been made* to the Court. The sale has not been confirmed by the Court.

On December 8, 1970, the trial court entered an order wherein the court orders, "the judgment of this court is final and complete."

On December 10, 1970, the trial court entered a judgment against Appellant for $500.00 in attorney fees.

Appellant perfected his appeal from the law side of the county court to the law side of the circuit court as required under Section 1616 of the Mississippi Code of 1942, amended.

On January 9, 1973, the circuit court rendered a judgment, which is void on its face, wherein said judgment purports to affirm the judgment of the trial court.

Appellant perfected his appeal from the circuit court judgment to the Supreme Court of the State of Mississippi and on November 10, 1975, said court entered a judgment

in said cause, wherein the judgment of the Hinds County Circuit Court is affirmed.

A Timely Petition For Rehearing was denied by the Mississippi Supreme Court on December 15, 1975, appendix infra A4.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The Appellant, Lewis O. Vice, Pro se, prior to trial, filed his answer to the amended bill of complaint and in his answer set forth certain affirmative defenses that brought into the trial the constitutional questions of the denial of equal protection of the law and due process, set forth hereinabove.

The following First Affirmative Defense made under oath and yet to be denied was set out as follows:

FIRST AFFIRMATIVE DEFENSE

That on February 7, 1969, Complainant, J. A. Ferguson, initiated a replevin action in the Justice of the Peace Court of J. W. Richardson, "Affidavit in Replevin" attached hereto and marked as "Exhibit A" and made a part hereof by reference, and unlawfully and illegally seized possession of one 1965 Ford Custom 500, four-door sedan automobile bearing serial number 5D52C109366 being the personal property of said Defendant being in his use and possession; "Writ of Replevin" attached hereto and marked as "Exhibit B" and made a part hereof by reference.

That Complainant, J. A. Ferguson, seized the said Ford automobile to satisfy an alleged indebtedness owed him by said Defendant; Complainant, J. A. Ferguson, fur-

ther misled the court and said Defendant that the property was safely in the protection of the sheriff with his "Declaration in Replevin" filed on March 10, 1969, attached hereto and marked as "Exhibit C" and made a part hereof by reference; and said Defendant will show that Complainant, J. A. Ferguson, had the said Ford automobile in his possession for his personal use, pleasure, benefit and profit at the time he filed his Declaration in Replevin, on March 10, 1969 stating that said Ford automobile "is now in the possession of the Sheriff of Hinds County, Mississippi;" and the said Complainant on August 11, 1969 filed a MOTION FOR NON-SUIT and dismissed his replevin action; copy of MOTION FOR NON-SUIT attached hereto and marked "Exhibit D" and made a part hereof by reference; after illegally and unlawfully taking possession of said Ford automobile for his personal use, pleasure, benefit, and profit, said Complainant dismissed his replevin action and refused to sell the said Ford automobile to satisfy the alleged debt; and said Complainant has ever since retained, unlawfully and illegally, possession of said Ford automobile for his personal use, pleasure, benefit, and profit; said Complainant gained possession of the said Ford automobile without posting a Replevin Bond with the Court, as required by law and without the consent of this court, copy of the record search from the Sheriff's Department of Hinds County, Mississippi attached hereto and marked as "Exhibit E" and made a part hereof by reference.

The Appellant further answered under oath prior to the trial that the automobile in question belonged to and was the property of the Appellant and Appellees had no legal interest in said property.

The Second Affirmative Defense filed under oath, reads as follows:

SECOND AFFIRMATIVE DEFENSE

That on March 25, 1968 Defendant executed a Deed of Trust, which with the execution of the note referred to therein created a contract of novation as to a certain Note and Deed of Trust executed by Complainant, J. A. Ferguson, on January 24, 1967; the essential elements of a contract of novation, i.e., (1) Three or more parties, (2) Previous valid obligation, (3) Acceptance and validation of new contract; these requirements were met when the documents executed on March 25, 1968 were accepted by the Deposit Guaranty National Bank of Jackson, Mississippi and the said Defendant made eight monthly payments therein or a total of Six Hundred Five Dollars and Forty-Four Cents ($605.44) paid on the new obligation; and the Note and Deed of Trust executed by Complainant, J. A. Ferguson, on January 24, 1967, were null and void; the Deed of Trust dated March 25, 1968, Personal check paid to Complainant, J. A. Ferguson, for his equity in said Ford automobile and payment book issued by said bank for new obligation all attached hereto and made a part hereof by reference, and marked respectively as "Exhibit F", "Exhibit G", and "Exhibit H".

And it was necessary to the Court's judgment in said case to determine said questions, raised by Appellant's affirmative defense; filed herein under oath, without any contradictory proof being presented at the trial of said case on its merits.

Prior to the trial on January 30, 1970, Appellant, Vice, Pro se, filed a motion to dismiss Appellee's "Bill of Complaint for Foreclosure" setting forth the following grounds:

1. That the party complainants are not proper parties.

2. That the complainants alleged cause of action has not been based on the proper documents.

On February 2, 1970, the trial court denied Appellant's motion to dismiss and granted Appellee thirty (30) days to file an amended Bill of Complaint.

On March 6, 1970, Appellant, Vice, Pro se, filed a "Motion requesting court for order requiring property involved and in the case at bar and now in the illegal and unlawful possession of Complainant, J. A. Ferguson, be surrendered to the possession of the Hinds County Sheriff's Department for safe keeping;" pursuant to the authority of Miss. Code 1942, Sec. 1546. Judgment—remedial orders, which states, in relevant part:

> "In all actions in which the right to real or personal estate is in controversy, the court or the Judge thereof *SHALL* make an order for the protection of the property in controversy. . . ."

On March 13, 1970, after a hearing in open court on the above motion, the court denied this Appellant the protection and due process as provided under the provisions of Miss. Code of 1942 Ann., Sec. 1546, set out in part, hereinabove.

On March 17, 1970, Appellant, Vice, Pro se, filed a "Motion to Strike" Appellee's Exhibits 1, 2 and 6 attached to Appellee's Amended Bill of Complaint. In open court on June 10, 1970, Appellant set forth in his argument to the court the following grounds in support of the Motion to Strike:

1. Exhibit 1 purports to be a copy of a promissory note dated January 24, 1967, and signed *ONLY* by Appellee, J. A. Ferguson.

2. Exhibit 2 purports to be a copy of a Deed of Trust dated January 24, 1967 and signed *ONLY* by Appellee, J. A. Ferguson.

Argument presented:

Under the laws of the State of Mississippi as provided under the provisions of Miss. Code of 1942 Ann., Sec. 59, set out, in relevant part:

> "No person is LIABLE on the instrument whose signature DOES NOT appear thereon." (Emphasis added).

These exhibits are null and void.

Therefore, since *Appellant's signature does not appear on said Exhibits,* it can not be used as a basis and foundation of Appellee's "Bill of Complaint for Foreclosure."

On June 10, 1970, after the hearing in open court on the above motion, the court denied this Appellant the protection and due process as provided under the provisions of:

Miss. Code of 1942 Ann., Sec. 72.

Miss. Code of 1942 Ann., Sec. 59.

Miss. Code of 1942 Ann., Sec. 73.

On April 9, 1970, Appellant, Vice, Pro se, filed his Demurrer to appellee's amended Bill of Complaint, setting forth the following grounds:

1. That the Complainants' Bill of Complaint does not state a cause of action upon which a judgment may be rendered against this Defendant.
2. That the note, dated March 25, 1968, and evidences the alleged debt being sued on, and referred to in

the Deed of Trust dated March 25, 1968, is not part of record.

3. That the Complainants' failure to show their legal standing of right to bring this cause of action against defendant; and for other causes to be shown at the hearing of this matter.

4. Exhibit 6 purports to be an assignment dated November 24, 1969.

Argument presented:

Under the laws of the State of Mississippi as provided under the provisions of Miss. Code of 1942 Ann., Sec. 72, set out, in relevant part:

"The endorsement must be written *on the instrument* itself or upon a paper *attached thereto.*" (Emphasis added).

This exhibit is null and void.

The instruments that Exhibit 6 purports to assign and transfer are not attached.

Furthermore, the same note (Exhibit 1), which Exhibit 6 purports to assign was involved in an attempted assignment and transfer from the bank to Appellee on February 10, 1969, three days after Appellee seized the Appellant's property.

Under the provisions of Miss. Code of 1942 Ann., Sec. 73, set out, in relevant part:

"The endorsement must be an endorsement of the entire instrument."

Therefore, under the law, Exhibit 6 is null and void for the reasons set out hereinabove.

A trial was had on September 29, 1970, in this case on its merits and the court entered its judgment without selling the property foreclosed; without producing the Appellant's Promissory Note executed to the bank on March 5, 1968; without adjudicating the rights to all the parties on September 30, 1970.

Appellant, Vice, Pro se, filed a timely motion for a new trial on October 7, 1970. Said motion was denied with the court's order entered in said case on December 8, 1970.

Appellant, Vice, Pro se, filed cash appeal bond and perfected his appeal to the Circuit Court on December 17, 1970.

The Appellant would further show that the federal questions involved were raised on appeal to the Circuit Court of Hinds County, Mississippi for the Court's consideration, determination and disposition in:

ASSIGNMENT OF ERRORS

1. The Appellant did not receive a fair trial in the lower Court.

2. The Court erred in overruling and in refusing to dismiss said cause of action on the motion of the Appellant because of Appellees' failure to answer interrogatories as required under the laws of the State of Mississippi, and in refusing appellant to be heard on his demurrer and preliminary motions before proceeding to the trial of the cause on its merits.

3. The trial Court erred in sustaining the motion of Appellees' attorney over the objections of the Appellant to amend his amended complaint "reforming the assumption agreement and chattel deed of trust dated March 25,

1968, to describe the indebtedness actually assumed by the defendant."

4. The trial Court erred in overruling Appellant's motion requesting the Court for an order for the protection of the property in controversy.

5. The trial Court erred in not excluding the questions asked by Appellees' attorney and the answers given by witnesses with reference to Appellees' exhibits Nos. 1, 2, 3, 4, 6, 7, and 8, all of which were irrelevant, incompetent, immaterial, and prejudicial to appellant.

6. The trial Court erred in permitting attorney for the appellee to interrupt, harass, and intimidate the Appellant, representing himself and presenting his case from the witness stand and refusing Appellant the right to use a copy of the Court record in this action, to refresh his memory and enable said appellant to relate with the proper continuity the facts, incidents, acts of appellee, and happenings which constituted said appellant's defense to appellees' foreclosure action.

7. The trial Court erred in refusing to permit appellant to introduce exhibits, evidence, records as to prior action between the parties, i.e., replevin action, Hinds County Court No. 50-932, and that said exhibits, evidence, and records are necessary for the appellant to show that appellee had converted the property to his own personal possession for his personal use, pleasure, benefit and profit instead of selling said property and applying proceeds to the alleged debt as provided by the laws of the State of Mississippi, all of which constitute a bar to appellees' foreclosure action against the appellant.

8. Appellees, plaintiffs failed to deny affirmative defenses, and offered no proof or testimony for the record

on issues denied by the answer, under oath, of the appellant, defendant.

The Federal questions set out hereinabove were considered by the Circuit Court of Hinds County, Mississippi, acting in the capacity of an appellate court only, did not affirm or reverse the judgments of the trial court, when it considered the constitutional questions, but entered its own judgment in the case, without a trial of case on its merits, on January 9, 1973.

An appeal to the Supreme Court of the State of Mississippi was perfected on February 5, 1973.

The Appellant would further show that the federal questions involved were also raised before the Supreme Court of the State of Mississippi for the Courts' consideration, determination and disposition in:

ASSIGNMENTS OF ERROR

I.

The appellant did not receive a fair trial in the lower Court.

II.

The lower Court erred in overruling and in refusing to dismiss said cause of action on the motion of the appellant because of appellees' failure to answer interrogatories as required under the laws of the State of Mississippi, and in refusing appellant to be heard on his demurrer and preliminary motions before proceeding to the trial of the cause on its merits.

III.

The lower Court erred in sustaining the motion of appellees over the objections of the appellant to amend

his amended complaint "reforming the assumption agreement and chattel deed of trust dated March 25, 1968, to describe the indebtedness actually assumed by the defendant."

IV.

The lower Court erred in overruling appellant's motion requesting the Court for an order for the protection of the property in controversy.

V.

The lower Court erred in not excluding the questions asked by appellees' attorney and the answers given by witnesses with reference to appellees' exhibits Nos. 1, 2, 3, 4, 6, 7, and 8, all of which were irrelevant, incompetent, immaterial, and prejudicial to appellant.

VI.

The lower Court erred in refusing appellant the right to use a copy of the Court record in this action, to refresh his memory and enable said appellant to relate with the proper continuity the facts, incidents, acts of appellee, and happenings which constituted said appellant's defense to appellees' foreclosure action.

VII.

The lower Court erred in refusing to permit appellant to introduce exhibits, evidence, records as to prior action between the parties, i.e., replevin action, Hinds County Court No. 50-932, all of which constitute a bar to appellees' foreclosure action against the appellant.

VIII.

Appellees failed to deny affirmative defenses, and offered no proof or testimony for the record on issues denied by the answer, under oath, of the appellant, defendant.

CONCLUSION

The Federal question is substantial.

The issues raised in this appeal are of importance to the citizens of the state of Mississippi.

Even though the United States Supreme Court has ruled that similar Replevin Statutes of Florida and other states were unconstitutional, *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972), the state of Mississippi continues to burden its citizens with the yoke of adversity, denial of due process and deprivation of property rights under its Replevin Statutes.

Fundamental principles must, from time to time, be reaffirmed if they are to have continuing validity. The legal position maintained here by the appellant, has without doubt, been widely relied upon by large segments of the population in the state of Mississippi.

Furthermore, no important state interest is served by a statute that denies a defendant his Constitutional rights to due process of law.

As in this appeal, denial of the due process of law only produces a windfall for a wrongdoer who is not even within the class of persons the Replevin Statutes is designed to protect.

Presumably, the statute is intended to provide redress in local courts for defendants, but plaintiffs are the only parties protected under such statutes.

The decision in this case will have a profound effect on the continuation of the practices followed by the Mississippi Courts in ignoring and refusing to recognize and protect the Constitutional rights of the citizens of this state

in its consideration, determination and disposition of the cases founded on the Mississippi Replevin Statutes.

The Federal questions raised hereinabove, at each level in the appellant's appeal of these matters, were necessary to the Court's judgment in said case to determine and dispose of said case; and said questions were determined adversely to the position of this appellant.

For the foregoing reasons, summary reversal should be granted, or in the alternative, probable jurisdiction should be noted.

Respectfully submitted,

By M. CHARLES MAY
2610 West Capitol Street
Jackson, Mississippi 39209
Attorney for Appellant

APPENDIX

JUDGMENT

STATE OF MISSISSIPPI

HINDS COUNTY

I, Julia H. Kendrick, Clerk of the Supreme Court of the State of Mississippi do hereby certify that the above and foregoing is a true and correct copy of Mandate issued December 16, 1975, and Order Denying Petition for Rehearing in the case of Lewis O. Vice vs. J. A. Ferguson, et al.—No. 48,426, as the same appears of record on file in my office, of which I am the keeper of the records in said proceedings; and I certify that as such Clerk I am the custodian and keeper of the records of the files of said Supreme Court and the Seal hereunto affixed is the Seal of said Court.

In witness whereof I have hereunto set my hand and the Seal of said Court in the City of Jackson, County of Hinds and State of Mississippi.

This the 5th day of March, A. D., 1976.

/s/ Julia H. Kendrick
(Seal) Supreme Court Clerk
State of Mississippi

STATE OF MISSISSIPPI
HINDS COUNTY

I, Robert G. Gillespie, Chief Justice of the Supreme Court of the State of Mississippi, do hereby certify that Julia H. Kendrick, whose name is signed to the foregoing

certificate, is known to me and is the Clerk of the said Supreme Court of the State of Mississippi, duly elected and sworn, and is the keeper of the records, files and proceedings of said Court and is by law the proper person to make out and certify copies of all the records and proceedings of said Court, and that full faith and credit is and ought to be given to her official acts. I further certify that the Seal affixed to her exemplification and transcript is the Seal of the said Supreme Court and that the attestation of said Clerk to said copies is in due form.

This the 5th day of March A. D., 1976.

/s/ Robert G. Gillespie
Chief Justice of the Supreme Court of Mississippi

(Seal)

STATE OF MISSISSIPPI
HINDS COUNTY

I, Julia H. Kendrick, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that Robert G. Gillespie, whose name is subscribed to the foregoing certificate of attestation now is, and was, at the time of signing the same, Judge of said Supreme Court, and was duly elected, commissioned, and qualified to office; that full faith and credit are, and of right ought to be, given to all his official acts as such, in all Courts of record and elsewhere, and that his attestation is in due form of law, and by the proper officer.

Given under my hand, with the Seal of said Court affixed, at office, in the City of Jackson, Mississippi, this the 5th day of March A. D., 1976.

/s/ Julia H. Kendrick
Supreme Court Clerk
State of Mississippi

(Seal)

STATE OF MISSISSIPPI

To the Honorable the Circuit Court, of Hinds County—
Greetings:

WHEREAS, on the 10th day of November, 1975 (the same being a day of the regular term of our SUPREME COURT, begun and held in the Court room, in the Capitol, in the City of Jackson, in said State, on the 2nd Monday of September, in the year of our Lord, 1975,) the following final judgment was rendered by our SUPREME COURT, to-wit:

LEWIS O. VICE

No. 48,426 vs.

J. A. FERGUSON AND THOMAS W. SANFORD,

SUBSTITUTED TRUSTEE

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court First Judicial District of Hinds County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 9th day of January, 1973-be and the same is hereby affirmed. Judgment is in the sum of $841.68 in favor of appellees against Lewis O. Vice with interest thereon at the rate of 6% per annum from January 9, 1973 until paid together with all costs taxed in the Court below. It is further ordered and adjudged that the appellant do pay all of the costs of this appeal to be taxed.

YOU ARE THEREFORE HEREBY COMMANDED, That such execution and further proceedings be had in said cause, as according to right and justice, and the judgment

of our SUPREME COURT and the law of the land ought to be had.

WITNESS, the Hon. Robert G. Gillespie, Chief Justice of our Supreme Court; also the signature of the Clerk and the Seal of said Court hereunto affixed, at office, at Jackson, this the 16th day of December, A. D., 1975.

....., Clerk

By ....., D. C.

IN THE SUPREME COURT OF MISSISSIPPI

MONDAY, DECEMBER 15, 1975, COURT SITTING:

LEWIS O. VICE

#48,426 VS

J. A. FERGUSON, ET AL

This cause this day came on to be heard on Petition for Rehearing filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied.

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IN THE COUNTY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 52-486

J. A. FERGUSON and THOMAS W. SANFORD,
Substituted Trustee
COMPLAINANTS

versus

LEWIS O. VICE
DEFENDANT

JUDGMENT

This day this cause came on for hearing and the complainants and the defendant being present in open Court and having adduced evidence and the Court having heard and considered the evidence finds that it has jurisdiction of the parties and of the subject matter and that the complainant, J. A. Ferguson, is entitled to recover judgment of and from the defendant in the amount of $378.40, plus accrued interest of $35.97, for a total judgment of $414.37, and that the 1965 Ford automobile bearing Serial Number 5D52C109366 in possession of the complainant, J. A. Ferguson, should be sold at a public sale as required by law and the proceeds of such sale be first applied to the costs in this cause and the balance paid to the complainant and the complainant have execution for any deficiency, and the Court should retain jurisdiction of this cause for further orders as may be necessary, including the determination of a reasonable attorney's fee.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the complainant, J. A. Ferguson, do have and recover judgment of and from the defendant, Lewis O. Vice, in the sum of $414.37, and that the Sheriff of Hinds County,

Mississippi, immediately cause to be made a public sale of the above described automobile as required by law and promptly have his report of the sale before this Court and that proceeds of such sale be first applied to the accrued Court cost in this cause and the balance paid to the complainant, J. A. Ferguson, and that the complainant, J. A. Ferguson, have execution for any deficiency, and that the Court retain jurisdiction of this cause for such further orders as may be necessary, including the determination of a reasonable attorney's fee.

ORDERED AND ADJUDGED, this 30 day of Sept., 1970.

/s/ Charles T. Barber
Judge

IN THE COUNTY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 52-486

J. A. FERGUSON and
PLAINTIFF

vs.

LEWIS O. VICE
DEFENDANT

ORDER

The motion of defendant, Lewis O. Vice, that the judgment be set aside and for a new trial, having this day come on for hearing, and the Court having heard and considered the same is of the opinion that said motion should be overruled, and the matter being fully considered said motion is hereby overruled. Accordingly,

IT IS BY THIS COURT ORDERED AND ADJUDGED that the defendant's motion to set aside the judgment of this Court and to grant defendant a new trial is hereby overruled and the judgment of this Court is hereby final and complete.

ORDERED AND ADJUDGED this 8 day of Dec., 1970.

/s/ Charles T. Barber
County Judge

IN THE COUNTY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 52-486

J. A. FERGUSON and THOMAS W. SANFORD,
Substituted Trustee
PLAINTIFFS

versus

LEWIS O. VICE
DEFENDANT

JUDGMENT ALLOWING ATTORNEY FEES

This day this cause came on for hearing on the motion of the plaintiff, J. A. Ferguson, for allowance of attorney fees and the Court having retained jurisdiction in this cause for the purpose of providing additional orders as may be necessary in the premises, and the Court having heard and considered said motion and having heard the evidence in Open Court and both the plaintiff and the defendant being present finds that the plaintiff, J. A. Ferguson, be and he is hereby awarded a reasonable attorney fee in this cause, which the Court finds to be in the sum of $500.00 and the Court further finds that said $500.00 is commensurate with the time and effort expended in this cause.

ACCORDINGLY, IT IS ORDERED AND ADJUDGED that the plaintiff, J. A. Ferguson, do have and recover judgment of and from the defendant, Lewis O. Vice, in the sum of $500.00 for payment of attorney fees expended in this cause and that said judgment bear interest at the rate of 6% per annum until paid and that the defendant be assessed with all costs accrued or to accrue in the collection of said judgment for all of which let execution issue.

ORDERED AND ADJUDGED this 10 day of December, 1970.

/s/ Charles T. Barber
Judge

/s/ Roy D. Powell
Roy D. Powell
Attorney for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 20,285

LEWIS O. VICE
APPELLANT

versus

J. A. FERGUSON and THOMAS W. SANFORD,
SUBSTITUTED TRUSTEE
APPELLEES

FINAL JUDGMENT ON APPEAL

This day this cause having come on for hearing on the appeal of Lewis O. Vice and on the briefs filed by appellant and the appellees and the Court having heard oral argument and having considered the briefs filed by each of the parties and having examined the record is of the opinion that the judgments entered in this cause are correct and in accordance with the law and should be and are hereby affirmed.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the judgment entered in this cause on or about the 30th day of September, 1970, in the amount of $414.37, less a

credit of $200.00, be and the same is hereby affirmed, and the judgment entered in this cause on or about December 10, 1970, for attorney fees in the amount of $500.00 be and the same is hereby affirmed and the appellee is allowed damages of five per cent (5%) as permitted by law in the amount of $35.87, and interest at the rate of six per cent (6%) in the amount of $91.44, for a total judgment of $841.68, together with interest thereon at the rate of 6% per annum until paid, and appellant is hereby assessed with all costs of Court and the cost of this appeal, for all of which execution may issue.

ORDERED AND ADJUDGED this 9th day of January, 1973.

/s/ M. M. McGowan
Judge

IN THE COUNTY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 50-932

M. A. LEWIS, JR., TRUSTEE FOR J. A. FERGUSON
PLAINTIFF

vs.

LEWIS O. VICE
DEFENDANT

ORDER OF NONSUIT

This cause having come on for hearing on the written motion of J. A. Ferguson, plaintiff, to dismiss this suit, without prejudice, at the cost of plaintiff, and the Court being fully informed, including information as to the interrogatories filed by defendant,

IT IS THEREFORE, ORDERED AND ADJUDGED that the motion of J. A. Ferguson be, and it is hereby sustained, and this suit is hereby dismissed, without prejudice, at the cost of the plaintiff.

ORDERED AND ADJUDGED this, the 11 day of August, 1969.

/s/ Charles T. Barber
County Judge

IN THE SUPREME COURT OF THE STATE
OF MISSISSIPPI

No. 48,426

LEWIS O. VICE
APPELLANT

vs.

J. A. FERGUSON AND THOMAS W. SANFORD,
SUBSTITUTE TRUSTEE
APPELLEES

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I.

Notice is hereby given that Lewis O. Vice, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Mississippi affirming the lower Courts decision allowing the appellees to take personal property of the Appellant under color of law and with aid of State Police and jurisdictal powers completely disregarding the decision in *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972), on December 15th, 1975.

This appeal is taken pursuant to 28 U.S.C. 1257 subsection 2.

II.

The clerk will please prepare a transcript of the record in this cause, for transmission to the clerk of the Supreme Court of the United States, and included in said transcript the following:

(A) Volumes I and II of the lower Court transcripts of the trial containing all of the evidence and testimony of the parties.

(B) Suggestion of Diminution of Record, etc. and the Courts ruling thereon.

(C) All briefs filed on behalf of all parties.

(D) Petition for rehearing.

(E) Courts order on the petition for rehearing.

(F) All other documents filed by the Parties herein.

III.

The following questions are presented by this appeal:

I.

CAN THE MISSISSIPPI COURTS ABSOLUTELY IGNORE THE UNCONSTITUTIONALITY OF THE MISSISSIPPI REPLEVIN LAWS IN FULL FORCE AND EFFECT ON FEBRUARY 7, 1969, *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972), *North Georgia Finishing, Inc.* v. *Di-Chem., Inc.*, 419 U.S. 601, 42 L. Ed. 2d 751, 95 S. Ct. 719 (1975), AND DENY THIS APPELLANT HIS CONSTITUTIONAL RIGHTS UNDER THE BILL OF RIGHTS AND THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?

II.

WAS THE WRONGFUL REPLEVIN, *McPherson* v. *Acme Lumber Co.*, 70 Miss. 649, 12 So. 857 (1893); *Robinson* v. *Friendly Finance Co.*, 241 Miss. 239, 139 So. 2d 256; *Fuentes* v. *Shevin*, 467 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972); *North Georgia Finishing, Inc.* v. *Di-Chem.*,

Inc., 419 U.S. 601, 42 L. Ed. 2d 751, 95 S. Ct. 719 (1975); APPELLEE'S FAILURE TO SELL SAID FORD AUTOMOBILE, AND CONVERSION OF SAID PROPERTY TO APPELLEE'S PERSONAL POSSESSION, USE, BENEFIT AND PROFIT, CONSTITUTE A BAR TO FORECLOSURE?

III.

WAS THE WRONGFUL FORECLOSURE ACTION, *Martin* v. *Coker*, 204 Miss. 576, 37 So. 2d 772 (1948); *Voges* v. *Ward*, 98 Fla. 304, 123 So. 785 (1929); *Cox Motor Co.* v. *Castle*, 402 S. W. 2d 429 (Ky. 1966), A VIOLATION OF THE APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE BILL OF RIGHTS AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

WITNESS MY SIGNATURE this 5th day of March, 1976.

/s/ M. Charles May
M. Charles May, Attorney of Record For the Appellant, Lewis O. Vice
2610 West Capitol Street
Jackson, Mississippi 39209

PROOF OF SERVICE AFFIDAVIT

STATE OF MISSISSIPPI
COUNTY OF HINDS

I, M. Charles May, attorney for the appellant, depose and say that on the 5th day of March, 1976, I mailed a true and correct copy of the foregoing Notice of Appeal to the following individuals at the addresses hereon, Via First Class mail with sufficient postage placed thereon;

Julia H. Kendricks, Clerk
Supreme Court State of Mississippi
P. O. Box 117
Jackson, Mississippi 39205

Roy D. Powell
Attorney At Law
P. O. Box 22493
518 E. Capitol Street
Jackson, Mississippi 39205

Attorney for Appellant

/s/ M. Charles May
M. Charles May

Subscribed and sworn to before me at Jackson, Mississippi this 5th day of March 1976.

/s/ Deloris B. May
(Seal) Notary Public
My Commission Expires: July 9, 1977.

Supreme Court, U. S.
FILED
JUN 1 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 75-1326

LEWIS O. VICE,
Appellant,
vs.
J. A. FERGUSON AND THOMAS W. SANFORD,
SUBSTITUTE TRUSTEE,
Appellees,

MOTION TO DISMISS

AND

MEMORANDUM BRIEF IN SUPPORT

ROY D. POWELL
Post Office Box 22493
Jackson, Mississippi 39205
Attorney for Appellees

M. CHARLES MAY
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Jackson, Mississippi 39209
Attorney for Appellant

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In the Supreme Court of the United States

LEWIS O. VICE — Appellant

VERSUS — No. 75-1326

J. A. FERSUSON AND
THOMAS W. SANFORD,
SUBSTITUTE TRUSTEE — Appellees

MOTION

The Appellees now come before this Court and move to dismiss the Appeal filed in this matter and in support of this motion would show this Court the following, to-wit:

1. That this appeal should be dismissed for lack of jurisdiction as the alleged Constitutional question presented to this Court was not properly or timely raised in the prior trial or Appellate proceedings and therefore the Appellant is barred from first raising this point on appeal to the United States Supreme Court. The Mississippi Supreme Court, Circuit Court and County Court never had any opportunity to and never expressly rendered a decision on the constitutionality of the Replevin statutes complained of herein.

2. Or that, in the alternative, if there is a Constitutional question presented, this Appeal should be dismissed as that Constitutional question is of such an unsubstantial nature when viewed in light of the prior trial proceedings as to not merit consideration by this Court. The Judgment of the Mississippi Courts rests on a more than adequate non-Federal basis.

MEMORANDUM BRIEF IN SUPPORT

1. The Apellant herein has upon appeal to this Court attempted to present to this Court issues that are presently being raised for the first time or that have no relevancy to the action being appealed.

In the Appellant's statement of jurisdiction for this

Court he contends that this Appeal brings into question the Replevin statutes Section 2841 through 2869 Mississippi Code of 1942 as annotated and amended. This contention is entirely erroneous and misleading and is merely an attempt by the Appellant to fraudulently perfect jurisdiction by this Court. The cause of action being appealed is not an action under the Replevin statutes cited by Appellant but rather a judicial foreclosure of a chattel deed of trust.

By way of background and in order to place the Appellant's contentions in their proper perspective, I will briefly summarize the events in question.

1. On February 7, 1969, Appellee Ferguson instituted a replevin action under the aforementioned statutes but no hearing or final decision was forthcoming as Appellee Ferguson non-suited the replevin action on August 11, 1969.
2. On August 19,1969, Appellant herein filed a suit, Cause No. 51-917, in the County Court of the First Judicial District of Hinds County, Mississippi, for damages against Appellee Ferguson and others for an alleged wrongful replevin.
3. On November 6, 1969, the Appellant's suit, Cause No. 51-917, was dismissed on motion for non-suit filed by the Appellant herein, a copy of that order may be found in Minute Book 37 at Page 340 of the Minutes of the County Court of the First Judicial District of Hinds County, Mississippi.
4. On November 25, 1969, Appellees filed their Bill of Complaint for Foreclosure, Cause No. 52-486, in the County Court of the First Judicial District of Hinds County, Mississippi from which this Appeal has been taken.
5. On September 30, 1970, a hearing was held before County Court of the First Judicial District of Hinds County, Mississippi, on the Bill of Complaint for Foreclosure and Judgment was rendered in favor of the

Appellees.

6. On October 7, 1970, Appellant herein filed a motion for a new trial on the Bill of Complaint for Foreclosure. Said motion was denied December 8, 1970.

7. On December 17, 1970, Appellant posted bond and perfected appeal to the Circuit Court of the First Judicial District of Hinds County, Mississippi. On January 9, 1973, that Court affirmed the Judgment entered in favor of the Appellees on its Bill of Complaint for Foreclosure by the County Court.

8. On February 3, 1973, Appellant appealed the decision of the Circuit Court to the Supreme Court of the State of Mississippi. On November 10, 1975, the Supreme Court of the State of Mississippi affirmed the Judgment in favor of the Appellees on which this appeal was taken.

As can clearly be seen from this brief out-line of the facts and dates in question, there was no connection between the Replevin statutes or action herein complained of and the Bill of Complaint for Foreclosure which is the cause of action sought to be appealed. The Appellant herein might or might not have had a cause of action for the alleged wrongful replevin but whatever the merits of his claim that the replevin was wrongful, he chose not to pursue that claim for damages, and abandoned that action.

The Appellant attempted to complain of the allegedly wrongful replevin in the foreclosure action. The Appellant listed in his answer and affirmative defenses an extensive statement of facts relating to prior action between the parties but never made any allegation or offered any theory of law setting out the alleged wrongful replevin as a bar to foreclosure proceedings. The Appellant herein did not at anytime plead the prior replevin action as a bar to the foreclousre of the chattel deed of trust nor would it have bee a bar if pleaded as such.

The trial Court on numerous occasions ruled that the former replevin proceedings were irrelevant and immaterial to the case at bar. (R 162, 187, 188, 189). The Trial Court was never presented with any issue concerning the Constitutionality of the then existing Replevin statutes and as the matter at bar dealt with a judicial fureclosure, it could not have ruld on such an issue, if presented, as the Replevin statutes were totally irrelevant and immaterial to the issues before that Court.

The Appellant further alleges in his Jurisdictional Statement that the issues of the Constitutionality of the Mississippi Replevin statutes were raised upon appeal to the Circuit Court of the First Judicial District of Hinds County, Mississippi. However, a careful reading of the Assignment of Errors listed by the Appellant on page 33 et. seq. of his Jurisdictional Statment fails to disclose any Constitutional question being raised. Also upon examination of the complete Assignment of Errors sent to the Circuit court, no reference can be found to any Constitutional question. The first occasion upon which the Appellant argued any violation of his Constitutional rights guaranteed by the Fifth and Fourteenth Amendments was upon appeal to the Supreme Court of Mississippi from the decision of the Circuit Court affirming the ruling of the county Court. No mention of any Constitutional question was made either at the trial level in County Court or upon first appeal to the Circuit Court. (See Assignment of Errors, R 219-220)

The only Constitutional question raised or argued by Appellant to the Supreme Court of Mississippi concerned the form of the Judgment and whether that particular type of Judgment could be entered by the County Court in such a proceeding as a judicial foreclosure (See Appendix A).

Appellee therefore says under the laws of the State of Mississippi and the United States of America that since the alleged Constitutional questions presented to this Court were not raised at either the County Court trial level, or on appeal to the Circuit Court, the Appellant could not raise such points in the Mississippi Supreme Court for the first time, and indeed did not raise a constitutional question concerning the validity of the Replevin statutes in that Court.

As authority to support the above point, Appellees cite the case of **Nationwide Mutual Ins. Co. v. Tillman,** et al, 249 Miss. 141, 161 So. 2d 604, (1964), wherein the Mississippi Supreme Court made this statement, to-wit:

" . . . A long-established rule of law which has been recognized by this Court, namely, that if the lower court does not have the opportunity and right to pass upon the errors alleged to have been committed therein, we will not here for the first time consider those errors."

This principle has been followed in numerous other cases and the following are just a few of the cases where this rule of law was followed.

Humble Oil & Refining Co. v. Martin, 298 F. 2d 163;
Dilworth v. Riner, 343 F. 2d 226;
Alexander v. Eastland, 37 Miss. 554;
Gale v. Lancaster, 44 Miss. 423;
Anderson v. Leland, 48 Miss. 253; and
A. H. George & Co. v. Louisville & N. R. Co., 40 So. 486, 88 Miss. 306.

Therefore since no question of the validity of the Replevin statutes was raised at any stage of proceedings prior to appeal to this Court, the question of Constitutionality of the Mississippi Replevin statutes were not timely or properly raised in order ot be considered by this Court.

The first occasion upon which this Appellant has sought to challenge the Constitutionality of the Replevin statutes

is upon appeal to this Court. The Mississippi Courts were never afforded an opportunity to rule on the Constitutionality of the Replevin statutes complained of herein.

The Appellees therefore say that since no Federal question was raised timely or properly this Appeal should be dismissed for lack of jurisdiction.

2. In the alternative, if the Constitutionality of the Replevin statues was properly raised and the Replevin statutes are determined to have been a part of the prior proceedings in any wise, this appeal should be dismissed as the Constitutional question and the role played by the Replevin statutes in the judicial forclosure were of such an unsubstantial nature as not to merit consideration by this Court. The Judgment rendered by the County Court and affirmed upon appoal by both the Circuit Court and Supreme Court rests on a more than adequate non-Federal basis.

The case at bar deals with the Court supervised foreclosure of a chattel deed of trust. The Replevin statutes complained of were totally irrelevant to this proceeding. In order to avoid repetition, the Appellees will adopt and incorporate the arguments made in support of the first reason for dismissal.

The County Court exercised supervision of the foreclosure of the the chattel deed of trust and subseuent sale and entered orders in conformity with its ruling on the merits of the foreclosure and the applicable state laws dealing with such an action. The County Court's actions were examined upon appeal by both the Circuit Court and the Supreme Court of Mississippi and found to have been in accord with the foreclosure proceedings. The role, if any, played by the Replevin statutes was so insignificant that the Appellant's Constitutional rights could not have been affected in any manner. The judgment in this cause dealt with a judicial foreclosure and sale and not with replevin. The foreclosure procedure is

not attacked here or at any prior level as being unconstitutional. The attack is upon the Replevin statutes that had no material role or relevancy to the original cause of action. Therefore, this Appeal should be dismissed as involving no substantial Federal question since the Judgment entered by the State Court rests on a more than adequate non-Federal basis.

CONCLUSION

There is no Federal question presented in the case at bar.

No Federal question presented here was timely or properly raised so as to allow the Mississippi Courts to pass on the issue.

The issues raised in the Appeal are of no importance to the citizens of the State of Mississippi as the Legislature of the State of Mississippi in response to **Fuentes v. Shevin**, 407 US 67, 32 L.Ed. 2d 556, 92 S.Ct. 1983 [1972], repealed Sections 2841 through 2869 Mississippi Code of 1942 as annotated and amended (Now Sections 11-37-1 through 11-37-57 Mississippi Code of 1972 as annotated and amended) on July 1, 1975.

There is no state statute in controversy in the original case at bar which denies a citizen his Constitutional rights. For the foregoing reasons, this appeal should be dismissed for lack of Federal Jurisdiction.

Respectfully submitted,

/s/ Roy D. Powell
ROY D. POWELL
Attorney for Appellees

ROY D. POWELL
POWELL & SANFORD, ATTYS.
Post Office Box 22493
Jackson, Mississippi 39205

APPENDIX A

POINT II

WHERE THE JUDGMENT ENTERED IS SO CONTRARY TO THE OVERSHELMING WEIGHT OF THE CREDIBLE EVIDENCE AS TO INDICATE PREJUDICE AND PASSION AGAINST THE APPELLANT AND SYMAPTHY FOR THE APPELLEES, IT IS THE DUTY OF THE COURT TO SUSTAIN A MOTION FOR A NEW TRIAL.

The appellant respectfully submits that the lower court erred in entering the judgment of September 30, 1970 in this cause of action after a trial on its merits, the judgment is void for the reasons set out hereinbelow and elsewhere in this brief as designated.

1. The law in effect at the time of the execution of the note and deed of trust must be followed in foreclosing same.

Appellee, J. A. Ferguson, claims an interest in the 1965 automobile by virtue of three documents, listed as follows:

A. On February 10, 1969, Henry P. Caldwell, Assistant Vice President of the Deposit Guaranty National Bank, made an assignment to appellee, J. A. Ferguson, on the back of a certain promissory note executed by appellee, J. A. Ferguson, on January 24, 1967, as the maker and made payable to the order of Deposit Guaranty National Bank. (R-141).

This assignment by the bank of appellee's note, after said note is paid and cancelled does not convey any interest of this appellant's property to the appellee, Ferguson, executed his "Affidavit in Replevin" on February 7, 1969, (R-181), and wrongfully seized and converted appellant's property to his appellee, own possession, profit, pleasure and benefit.

B. The second purported assignment dated November 24, 1969, is an instrument unattached, separate, and apart from the note and deed of trust which it purports to assign and does not convey any

legal interest in said property to appellee, J. A. Ferguson, (R-148).

This assignment purports to "assign, sell and convey, set over and deliver to J. A. Ferguson that certain promissory note and chattel deed of trust executed by J. A. Ferguson on January 24, 1967," approximately ten (10) months after appellee, Ferguson, executed his "Affidavit in Replevin," (R-181) and without notice wrongfully siezed appellant's property and converted same to his (appellee) personal use, possession, pleasure and benefit.

C. The third purported assignment dated February 2, 1970, is an instrument unattached, separate, and apart from the deed of trust which it purports to assign and does not convey any legal interest in said property to appellee, J. A. Ferguson. (R-146)

The third purported assignment attempts to assign a chattel deed of trust executed by the appellant, Lewis O. Vice, on March 25, 1968, with M. A. Lewis, Jr., as trustee and the Deposit Guaranty National Bank as beneficiary, covering a certain 1965 Ford Custom 500 four-door sedan automobile bearing Serial Number 5052C109366 and given to secure a promissory note of even date as stated therein.

The alleged note which represents the debt, was not assigned. Appellees did not produce the alleged note executed by this appellant on March 25, 1968, and presentment of the note with demand for payment was never made to this appellant.

Mr. J. D. King, Vice President of the Ellis Avenue Branch of the Deposit Guaranty National Bank was available as a friendly witness to the appellees, and as a bank officer who handled this appellant's loan on March 25, 1968, had full knowledge of the alleged note executed by this appellant on March 25, 1968 and the deed of trust of same date. Appellees refused to call Mr. King as a

witness, (R-176), to establish the note being sued on. (R-176)

Appellee, Thomas W. Sanford, substituted trustee, claims an interest by virtue of two documents executed by appellee, J. A. Ferguson; wherein the said documents purport to substitute Thomas W. Sanford as trustee in the place and stead of the said trustee, M. A. Lewis, Jr.

1. One document titled "Substitution of Trustee" executed by appellee, J. A. Ferguson, and dated November 24, 1969, purports to substitute Thomas W. Sanford as trustee in the place and stead of trustee, M. A. Lewis, Jr., on a chattel deed of trust executed by appellee, J. A. Ferguson, on January 24, 1967, and the Deposit Guaranty National Bank as beneficiary. (R-150)

Appellee, Ferguson's chatttel deed of trust dated January 24, 1967 makes no reference to appellant's note and chattel deed of trust dated March 25, 1968.

2. The second document titled "Substitution of Trustee" was executed by appellee, J. A. Ferguson, and dated February 20, 1970, and purports to substitute Thomas W. Sanford as trustee in the place and stead of trustee, M. A. Lewis, Jr., on a chattel deed of trust dated March 25, 1968, and executed by appellant, Lewis O. Vice, covering the above described 1965 Ford automobile wherein the Deposit Guaranty National Bank is made the beneficiary and the chattel deed of trust is given to secure a promissory note of even date, as stated therein. (R-152)

Thomas W. Sanford, the substituted trustee did not appear at the trial as a witness. No testimony was offered on the record that said trustee was foreclosing on the alleged note and deed of trust executed by this appellant on March 25, 1968.

The Deposit Guaranty National Bank attempted three assignments of the alleged debt, one on February 2, 1970. See Brasfield testimony, (R-176), wherein he states:

Vice: "Then here you are attempting to assign him the same note again. How did you reacquire the note?"

Brasfield: "We are assigning the rights which we retained in the note to Mr. Ferguson."

Section 93, Mississippi Code of 1942, recompiled.

Section 93. What constitutes a holder in due course.

"a holder in due course is a holder who has taken the instrument under the following conditions:

(1) That it is complete and regular upon its face.

(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

(3) That he took it in good faith and for value.

(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Appelle, Ferguson, was never a holder in due course of the alleged note and chattel deed of trust, the alleged assignment was made to him by Brasfield representing the bank on February 2, 1970 over one (1) year after the due date of the alleged debt. It was not complete and regular on its face, the alleged promissory note and deed of trust executed by appellant on March 25, 1968 was lost or misplaced by the bank and the said bank attempted to transfer the debt without the note, see Vice testimony (R-123, 124, 125).

Powell: "Now, you say you executed some other instruments at the same time?"

Vice: "Yes, sir."

Powell: "And this consisted of a note and chattel deed of trust."

Vice: "Yes, sir."

Powell: "Do you know where the originals of these instruments are?"

Vice: "No, sir."

Said appellee did not take the instruments in good faith and was well aware and had notice that the alleged debt was past due, see Ferguson testimony, (R-158):

Vice: "And when did you pay the note off?"

Ferguson: "I paid the note off on February 10, 1969."

Section 100, Mississippi Code of 1942, recompiled.

Section 100. What constitutes notice of defect.

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith.

Appellant contends that appellee Ferguson took the alleged debt in bad faith.

Section 233. Mississippi Code of 1942, recompiled.

Section 233. Person primarily liable on instrument.

"The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable."

Section 161, Mississippi Code of 1942, recompiled.

Section 161. When persons secondarily liable are discharged.

"A person secondarily liable on the instrument is discharged:

(1) By any act which discharges the instrument.

(2) By the intentional cancellation of his signature by the holder.

(3) By the discharge of a prior party.

(4) By a valid tender of payment made by a prior party.

(5) By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.

(6) By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

Section 160, Mississippi Code of 1942, recompiled.

Section 160. Instrument-how discharged.

"A negotiable instrument is discharged:

(1) By payment in due course by or on behalf of the principal debtor.

(2) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.

(3) By the intentional cancellation thereof by the holder.

(4) By any other act which will discharge a simple contract for the payment of money.

(5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right."

All of appellee Ferguson's notes and deeds of trust were discharged, null and void when this appellant executed a new promissory note and a new deed of trust on March 25, 1968 and when the Deposit Guaranty National Bank, without a legal right to do so, made demand on the appellee Ferguson and duped him into buying one of his old notes that he had executed on January 24, 1967. He discharged the alleged debt charged against this appellant on the note dated January 24, 1967 because under the Negotiable Instruments Laws of the State of Mississippi in effect on March 25, 1968, said note was discharged when the principal debtor becomes the holder of the instrument at or after maturity in his own right.

Appellant contends that under the laws of the State of Mississippi, the appellees did not have a cause of action against this appellant and the lower court should have granted appellant's motion for a directed verdict.

The appellees have failed to show a legal interest in the

subject matter, and the Supreme Court of the State of Mississippi in **St. Paul Fire Ins. Co. V. Auto Co.**, 121 Miss. 745, 83, So. 807, said:

"In an action, in a law court the plaintiff in order to sustain his cause of action, has to plead and prove as an essential element in his case, a legal title to the subject matter of litigation."

Appellees failed to prove a legal interest in the property in litigation and the lower court erred in sustaining appellees' motion. Appellant was prejudicated thereby and deprived of his constitutional right to his property and denied due process of law guaranteed to him by the Constitution of the State of Mississippi and the 5th and 14th amendments of the United States Constitution.

2. The judgment entered here does not conform to the finding of fact as stated in open court at the end of the trial of this cause on September 29, 1970. (R-193, 194)

3. On June 19, 1970, the lower court entered an order in this cause (that said cause of action would be moved from the equity side of the County Court to the law side of the court, the judgment entered here is not a law judgment and does not conform to the pleadings entered in this cause. (R-97)

4. A judgment must be complete in itself, and it was of course irregular in any view to attempt to reserve power to enter future judgments. In a law court, the action must be concluded by single judgment. (R-193,194)

7. The judgment fails to adjudicate the interest of the appellant in the note executed and dated March 25, 1968. (R-193, 194)

8. The judgment entered here on September 30, 1970 fails to adjudicate the interest of the appellee, Thomas W. Sanford, Substituted Trustee; and does not conform to the pleadings or the proof, as to appellee, Thomas W. Sanford, Substituted Trustee. (R-193, 194)

9. The judgment fails to state who is the owner of the

property to be sold and, "in the possession of the complainant." (R-193, 194)

11. The judgment here was entered for a greater amount than sought by the plaintiffs in their Amended Bill of Complaint. (R-193, 194)

12. The judgment entered here on September 30, 1970 is not specific and certain as to the amount of money awarded plaintiffs. (R-193, 194)

13. The interest of all parties in this cause of action was not adjudicated in the judgment entered here. (R-193, 194)

In **Watkins V. Blass, 164 Miss. 325, 145 So. 348**, the Supreme Court of the State of Mississippi held, that:

"The trial court erred by entering the judgment for a sum greater than that sought by the plaintiff in his declaration."

In **Sentry V. Sinclair, 130 Kan. 360, 286 P. 269**, the Supreme Court of the State of Kansas held that:

> "Judgment should not include interest where it was not alleged that note bore interest, and no interest was prayed for."

Appellant contends that a judgment for money must specify with definiteness and certainty the amount for which it is rendered and for this reason alone the judgment entered here must fail.

In **Claughton V. Black et al., 24 Miss. 188,** the Supreme Court of the State of Mississippi said:

> "We are therefore of the opinion, that if the judgment as entered upon the minutes, fails to give the amount of money adjudged to plaintiff, it is void, and cannot be corrected or rendered valid by the entry of the clerk."

Without belaboring the issues as discussed under Assigned Errors of this brief, appellant respectfully submits that the judgment entered in this cause on September 30, 1970 is contrary to the law, to the overwhelming weight of the credible evidence and does not

conform to the pleadings and the proof entered in this cause, said judgment constitutes a denial of appellant's property in derogation of the Constitution of the United States and the State of Mississippi, and denies this appellant due process and in an attempt to avoid repetition, appellant hereby relies upon the agruments and authorities as cited in this brief in support of the error assigned herein under Assigned Errors No.s I, III, IV, VI VII, IX, X, XI and XII for the purpose of this original brief, and hopes the same meets with the Court's approval.

PROOF OF SERVICE AFFIDAVIT

STATE OF MISSISSIPPI
COUNTY OF HINDS

I, Roy D. Powell, Attorney for the Appellees, depose and say that on the 17 day of May, 1976, I mailed a true and correct copy of the foregoing Motion to Dismiss and Memorandum Brief in Support to M. Charles May, Attorney at Law, 2610 West Capitol Street, Jackson, Mississippi 39209, Via First Class mail with sufficient postage placed thereon.

/s/ Roy D. Powell
ROY D. POWELL
Attorney for Appellees

Subscribed and sworn to before me at Jackson, Mississippi this 17 day of May, 1976.

/s/ Charlotte B. Anding
CHARLOTTE B. ANDING
Notary Public

My Commission Expires:
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